UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

Case 14-CA-213219

and

JOE BELL, an Individual

RESPONDENT'S REPLY BRIEF TO THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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INTRODUCTION

Respondent St. Louis Cardinals, LLC ("Respondent" or "Cardinals"), by its undersigned counsel and pursuant to Rule 102.46(e) of the Board's Rules and Regulations, respectfully submits this Brief in Reply to the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of Administrative Law Judge ("ALJ") Arthur A. Amchan.[1]

The General Counsel's Answering Brief contains multiple erroneous assertions of law, several of which Respondent highlights below. Specifically, the General Counsel incorrectly: (1) suggests Painting Foreman Patrick Barrett ("Barrett") does not constitute a Section 8(b)(1)(B) representative because he has not been referred to specifically as a "grievance adjustor," and/or had not yet assumed his grievance adjustment functions when internal union charges were filed against him; (2) attempts to read Section 8(b)(1)(B) out of the Act through reference to supervisory impacts on terms and conditions of employment; (3) suggests internal union fines against Section 8(b)(1)(B) supervisor-members do not constitute proscribed "coercion"; and (4) supports the

[1] References to the General Counsel's Answering Brief are identified by the letters "Ans." followed by page number, e.g., "Ans. ___." References to the Amended Complaint are identified by the letters "Compl." followed by paragraph number, e.g., "Compl. __."References to the hearing transcript are identified by the letters "Tr."followed by page and line numbers, e.g. "Tr. __:__." References to the ALJ's Decision are identified by the letters "ALJD" following by page number, e.g. "ALJD __."

ALJ's "pretext," rather than dual motives, analysis of Respondent's rebuttal defense under *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

The Board should not countenance such clear misapplications of Board law. Instead, the Board should properly find merit in Respondent's Exceptions and should dismiss the General Counsel's allegations.

I. Respondent's Painting Foreman Constitutes a Section 8(b)(1)(B) Representative.

As the General Counsel acknowledges, Respondent's collective-bargaining agreement specifically identifies a formal role for the Painting Foreman in the grievance process. Ans. 3. Accordingly, when Barrett actually served as a grievance representative for Respondent, that service reflected a straightforward application of the contract. There is no evidence that the involved labor organization ever questioned Barrett's service in that role. Indeed, it would have possessed no basis to do so. The timing of that grievance meeting does not diminish Barrett's contractual-specified role in the grievance process.

Furthermore, the evidence clearly establishes both Barrett and his predecessor, Billy Martin, regularly engaged in the adjustment of informal grievances and contract interpretation. (Tr. 279-80). The Board unequivocally finds such informal grievance adjustment sufficient to establish Section 8(b)(1)(B) status. *Local No. 10*, 338 NLRB 701, 701 (2002) (relying on supervisor's "daily responsibilities" involving "wage rates, expenses, work hours, length of breaks, poor work performance, and safety issues…albeit at an informal level before such complaints become subject to the formal grievance procedure" to find him to be a Section 8(b)(1)(B) representative). As with formal grievances, nothing about the timing of Barrett's promotion, announced immediately *prior* to the Charging Parties' internal union charges, bear on his clear qualification as a Section 8(b)(1)(B) representative.

Nonetheless, the General Counsel perplexingly makes much of the absence of the term "grievance adjustor." Respondent knows of no authority requiring it to create a "grievance adjustor" job title, or to make any formal "grievance adjustment personnel" designation whatsoever, in order for Section 8(b)(1)(B) to apply.[2] Any such interpretation of Section 8(b)(1)(B) representative qualifications runs contrary to the many Board and Supreme Court cases finding that many different roles and duties can establish Section 8(b)(1)(B) status. See, e.g., *San Francisco-Oakland Mailers' Local 18 (Northwest Publications)*, 172 NLRB 2173 (1968); *NLRB v. IBEW Local 340*, 481 U.S. 573, 588 (1987).

II. The General Counsel's References to Supervisory Impacts on Terms and Conditions of Employment Reflect a Misinterpretation of Section 8(b)(1)(B) That Would Render the Section Meaningless.

The General Counsel and ALJ both rely upon the general proposition that, "trying to remove a supervisor is protected activity when, as here, that supervisor can affect conditions of employment." Ans. 2; ALJD 5. Specifically, they suggest a concern amongst the Charging Parties, prior to their filing the internal union charges, that Barrett would subsequently terminate them. None of the Charging Parties, however, provided any definitive testimony that they held, discussed, shared, or voiced that speculative concern to anyone. On the other hand, as explained more fully in Respondent's Brief in Support of Exceptions, the evidence is replete with evidence that the Charging Parties sought Barrett's removal for less innocent reasons, including that they wanted one of them to receive the position. See, e.g., (Tr. 111, 113, 141, 306).[3]

[2] In fact, Respondent knows of no business entity that utilizes a "grievance adjustor" job title.

[3] The General Counsel relies upon *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at * 4 (2014), for the proposition that: "[a]n employee's subjective motive for taking action is not relevant to whether that action was concerted." *Fresh & Easy* is not applicable here because concert is not at issue. Nonetheless, assuming *arguendo* that *Fresh & Easy* could have any application here, the Board should overrule that case as inconsistent with the *Meyers* line of cases.

More importantly, none of these considerations undermine the fact that Barrett is a Section 8(b)(1)(B) representative, and the Charging Parties sought to reverse Respondent's selection of him. As a matter of course, *virtually every Section 8(b)(1)(B) representative exercises supervisory duties*, particularly given the role of grievance adjustment as an indicator of Section 2(11) status. The General Counsel's arguments suggest that the Board's cases on protests of (potential) supervisory treatment subsume the language of Section 8(b)(1)(B) entirely. If employees could enjoy the Act's protection for removal of Section 8(b)(1)(B) representatives simply because those representatives' supervisory duties affect terms and conditions of employment, then Section 8(b)(1)(B) would be rendered meaningless. To the contrary, the Act draws a line between Section 7 activities and Section 8(b)(1)(B) conduct, and the Charging Parties crossed that line here.

In fact, the General Counsel even seems to argue that the Charging Parties' grievances could not lose protection because they did not specifically make statements to the effect of, "We are seeking the removal of Patrick Barrett because we do not want him to process grievances." Ans. 7. That approach would produce absurd results. Of course, few employees would ever have occasion to pursue such an oddly-specific internal union charge remedy. On the other hand, an internal union charge seeking to compel a Section 8(b)(1)(B) representative "to step down" **(or "to be removed")** tracks Section 8(b)(1)(B)'s "selection" language as closely as any such charge could.

The resulting analysis here is relatively straightforward: Barrett is a Section 8(b)(1)(B) representative, the Charging Parties pursued internal union charges in an effort to remove him from that position, and therefore those charges were unprotected. Any attempt to transform the charges into a protest of anticipated supervisory treatment is completely contrary to the very purpose of Section 8(b)(1)(B).

III. Board Law Clearly Contradicts the General Counsel's Distinction Between Coercion of a Section 8(b)(1)(B) Representative as an Individual and Coercion of an Employer.

The General Counsel also attempts to draw a distinction between coercion of Barrett as an individual on one hand, and coercion of Respondent as an employer. Specifically, it argues, "[i]ntraunion fines, by their very nature, do not impact the employer or the employer-employee relationship unless the fines are directed at 8(b)(1)(B) duties like grievance processing." Ans. 7. This assertion flies directly in the face of consistent Board decisions finding that intraunion fines of a supervisor-member do, in fact, constitute coercion of an employer, even if the charges do not specifically refer to grievance handling or contract interpretation duties. *IBEW Local 77 (Bruce-Cadet),* 289 NLRB 516, 519 (1988); *Carpenters & Joiners, Local 1620,* 208 NLRB 94, 99 (1974).[4]

The General Counsel's assertions that the Charging Parties' internal union charges did not coerce Respondent are thus unsupported by Board law. Furthermore, as explained in Respondent's Brief in Support of Exceptions, the General Counsel's and ALJ's reliance on *Elevator Constructors,* (Otis Elevator Co.) 349 NLRB 583 (2007) represents a misplaced application of a wholly separate strand of Section 8(b)(1)(B) jurisprudence. Consequently, there is no legitimate basis for any dispute regarding the "coercion" aspect of the Charging Parties' conduct.

IV. Assertions of Pretextual Motives Do Not Impact Analysis of a Charged Party's *Wright Line* Rebuttal Defense in a Dual Motives Case.

The General Counsel embraces the ALJ's incomplete treatment of Respondent's *Wright Line* rebuttal defense – "Respondent's alternative explanations for not recalling the 4 [Charging Parties] are pretextual" – by bluntly asserting, "This is a complete *Wright Line* analysis."

[4] The General Counsel's attempt to draw a line between Barrett and Respondent is also inconsistent with its own Amended Complaint allegation that Barrett is a supervisor and agent of Respondent under Section 2(11) and (13), and thus that Respondent is bound by his conduct. Compl. 4.

To the contrary, such analysis is incomplete where, as here, Respondent advances a **dual motives** rebuttal defense. Respondent has shown that, even assuming *arguendo* the Charging Parties engaged in protected activities, and animus toward those activities contributed to its decision-making, Respondent would have taken the same actions due to legitimate business reasons. Simple categorization of those legitimate reasons as "pretextual" does not even begin to address a dual motives analysis.

The Board in *Wright Line* itself *explicitly* distinguished between dual motive cases on one hand, and pretext cases on the other. 251 NLRB at 1083-84 (explaining that, in a pretext case, "no legitimate business justification for the discipline exists, [so] there is, by strict definition, no dual motive[,]" while "[t]he pure dual motive case presents a different situation."). As explained in Respondent's Brief in Support of Exceptions, Respondent has provided numerous legitimate business justifications for its actions. This is a dual motives case. The General Counsel and the ALJ cannot alter that analysis merely by claiming pretext and calling it a day.

The ALJ's analysis, in effect, denies the existence of dual motives analysis. Such an approach would impermissibly eviscerate decades of Board and Court of Appeals precedent embracing the dual motives distinction. *Cadbury Beverages, Inc. v. NLRB,* 160 F.3d 24, 29 fn. 4 (D.C. Cir. 1998) (noting *Wright Line* allows a charged party to prove, "despite any unlawful motive, the same action would have occurred pursuant to some additional, lawful motive"); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998) (explaining a charged party can "avoid a finding of an unfair labor practice if it can show that it would have taken the action regardless; that is, for legitimate reasons"); *Oakes Machine Corp.*, 288 NLRB 456, 458 (1988) (noting that where both lawful and unlawful grounds motivated a charged party, it can

prevail if it shows that the lawful reason alone would have prompted its actions), enf. granted in part, denied in part on other grounds 897 F.2d 84 (2d Cir. 1990).

As a result, the Board should find that Respondent rebutted any purported *prima facie* case by establishing legitimate business justifications for its actions under a dual motives analysis.

V. Conclusion

For these and all of the reasons discussed in Respondent's Brief in Support of Exceptions, Respondent's Exceptions should be granted, the findings and conclusions of the ALJ to which Respondent has excepted should be overturned, the Board should conclude that no violations of the Act occurred, and the Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of December, 2018, I filed the foregoing RESPONDENT'S REPLY BRIEF TO THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS via the National Labor Relations Board's E-File system, served via Federal Express, and emailed to the following parties:

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